

Senada Zatagić

## **A Neglected Right**

Prospects for the Protection of the Right to be Elected in  
Bosnia and Herzegovina

# BALKAN POLITICS AND SOCIETY

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# ABBREVIATIONS

ACHPR/African Commission	African Commission on Human and People's Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court of Human and People's Rights
AfCHPR	African Charter on Human and People's Rights
AU	African Union
BiH	Bosnia and Herzegovina
Dayton Constitution	Annex IV of the Dayton Peace Agreement – Constitution of Bosnia and Herzegovina
DPA	Dayton Peace Agreement
ECHR/the Convention	European Convention on Human Rights
ECtHR/the Court	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
HRC	The Human Rights Committee
IACHR/American Commission	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
NGOs	Non-governmental organizations
OAU	Organization of African Unity
OHR	Office of High Representative
PIC	Peace Implementation Council
SAA	Stabilization and Association Agreement
UDHR/Declaration/Universal Declaration	The Universal Declaration of Human Rights
UN	United Nations



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# Introduction

When Dervo Sejdić and Jakob Finci applied to the European Court of Human Rights (hereinafter: ECtHR or the Court), little did they know it would become an important milestone in both Bosnia and Herzegovina's (BiH) constitutional reform process and human rights protection, in general. This case, and later Azra Zornić and Ilijaz Pilav's cases, raised many questions concerning the discriminative provisions of Bosnia and Herzegovina's constitution. It went beyond by causing serious academic discussions regarding issues of the peace agreements' importance, consociational power-sharing arrangements and the constitutional texts adopted in the peace negotiation processes and the primacy they give to human rights (McCrudden and O'Leary 2013). One important issue, however, was neglected altogether, and that is where this book will focus.

The cases decided by the European Court of Human Rights in 2009, 2014, 2016, 2019 and 2020 concerned racial discrimination in the election process based on ethnic origin. The rights of the citizens of Bosnia and Herzegovina were violated because they did not declare an affiliation with the country's three constituent peoples who make up the majority of the country's population. Those who are Jewish, Roma, Albanian, undeclared of any affiliation, or affiliated but residing in a part of the country where its ethnic group is not a majority are deprived of the right to be elected to the state presidency or second chamber of the parliament in Bosnia and Herzegovina. The Court's rulings confirmed the constitutive provisions prescribing this as discriminatory.

Once the first Court's decision became final, and the process of its execution was about to start, it became clear that its implementation would inevitably have wider consequences for the state's constitutional and political system. The EU intervened in the execution process by setting the implementation of the ECtHR's ruling as a precondition for the negotiation of Bosnia and Herzegovina's membership to postpone dealing with the ruling until a later phase of the country's association process because of the lack of political will. The failure to implement the ECtHR's decisions continued to show up in the EU country progress reports concerning Bosnia and Herzegovina's potential membership, though the EU's authority in the country was undermined (EU 2019).

At the same time, the ruling in the *Sejdić and Finci* case concerning the country's constitutional system represented the first in which the violation of Article 1 of Protocol No. 12 to the ECHR was declared, drawing international attention, and gaining popularity in academic literature as this protocol introduced general prohibition of discrimination in the European system of human rights protection.

Bosnia and Herzegovina, a country still marred from the war which started in 1992 and ended in 1995 by international intervention, is now governed by a flawed constitution that arose out of the peace agreement – the Dayton Accords. The Dayton Constitution guarantees high human rights standards on the one hand, while protecting interests of the three main ethnic groups in the country on the other, thereby systematically discriminating against minorities and citizens.

Each of the above-mentioned complex issues made the ECtHR rulings in the cases of *Sejdić and Finci v. Bosnia and Herzegovina*, *Zorić v. Bosnia and Herzegovina*, *Pilav v. Bosnia and Herzegovina*, *Šlaku v. Bosnia and Herzegovina*,

Baralija v. Bosnia and Herzegovina, and Pudarić v. Bosnia and Herzegovina interesting for further investigation. In the initial research phase, I was curious about the ignored legal impacts of these decisions. However, the substantial right violated in all these cases – the right in which the applicants faced discrimination and the right whose protection is so important that it requires constitutional changes in post-war Bosnia and Herzegovina and the Dayton Peace Agreement’s overriding power-sharing mechanisms, the right to be elected, deserves greater attention in academic literature. Thus, this book has chosen to focus on this dimension of the ECtHR decisions, with a special emphasis on the protection of the right to be elected both in general and in Bosnia and Herzegovina, specifically.

The existing literature analyzed is mainly composed of political impacts (ESI 2013) and some of the ECtHR decisions’ legal impacts (Tran 2011, Claridge 2010). The most significant resource on this topic is Christopher McCrudden and Brendan O’Leary’s book *Courts and Consociations – Human Rights versus Power Sharing*, which presents a defense of consociations in favor of a devaluation of human rights’ importance. In their book the authors criticize the ruling in the Sejdić and Finci case, questioning the Court’s capability to decide on issues concerning states with consociational elements and its overall expertise and objectiveness. Although the ruling in the Sejdić and Finci v. Bosnia and Herzegovina case is analyzed in this book, there is no analysis regarding the protection of the right to be elected, or the ruling’s importance or impacts. Rather, the authors defend the idea that the consociational power-sharing arrangements hold greater power and importance than human rights protection simply

because they stopped conflict and brought peace in this still divided country.

It is also fascinating that there is little research concerning the prohibition of the discrimination in the context of these decisions. The analyzed decisions were first decided based on Protocol No. 12 to the ECHR, with most of the comments restricted due to the Court's definition of discrimination in this Protocol, which is identical to the definition contained in Article 14 of the ECHR without further analysis in this context as well (Bardutzky 2010).

While there is substantial literature on the impacts from the ECtHR's ruling in the case of *Sejdić and Finci v. Bosnia and Herzegovina* in matters concerning power-sharing (McCrudden and O'Leary 2013), minority rights and discrimination (Claridge), EU conditionality (Perry 2015, Huszka 2017), and related constitutional essentials of democratic politics (Wheatley 2012) and citizenship (Cirkovic 2014, Džankić 2015), one important area is addressed by the ruling, but relatively ignored by academia: the area of electoral rights, or more precisely, the right to be elected. The Court, while analyzing the applicants' complaints in *Sejdić and Finci v. Bosnia and Herzegovina*, significantly contributed to the case law concerning Article 3 of Protocol No. 1 to ECHR and interpreted this provision as applicable to the second house of Parliament in cases when its competences concern an important role in the legislative process. This was not commented on in detail in literature. Overall, the substantive right of the issue was merely ignored, and all the attention was directed to the discrimination of minorities' rights, the case's main issue, once more neglecting the right to be elected.



In researching the conceptual framework of this study, I was confounded first by the many synonyms used for passive suffrage and second, by the considerable lack of literature concerning this right. I found only one article (Johns 2016), which stated that there is a gap in literature concerning this concept. In her dissertation, Johns significantly contributes to the conceptualization and justification of the right to be elected as a human right (Johns 2014). Her theoretical justification of the existence of the right to candidacy – the term she prefers – in all liberal democracies is based on the values and interests contained in this right: dignity, autonomy, self-expression, and self-development. The author further argues that the effective exercise of the right to vote and freedom of association, as well as the maintenance of general liberal culture, is not possible without the full enjoyment of the right to be elected. This justification is additionally strengthened through correlative duties of the state which are raised from this right – to respect, to protect, and to fulfill. The philosophical and theoretical framework for the right to candidacy, which Johns establishes in her dissertation, are valuable in arguing for this right's importance.

Another relevant and more recent contribution to the scarce literature on the right to be elected is the edited volume of essays concerning women's rights to be elected in the United States (Piscopo and Shames, 2020), which focuses on this political right's main limitation. Analyzing differences between the right to vote and the right to be elected and examining the guarantees of this right given to women all over the world, Piscopo and Shames argue that the right to vote and the right to be elected need to be accepted as co-equal rights, suggesting that the definition of representational government could change as a result of altering and trusting in

democracy. Although narrow and specific, this book contributes to the discussion on the guarantee and protection of the right to be elected, confirming Johns' claim that the right to be elected is an under-researched and under-theorized human right.

After investigating the existing literature on the subject, I concluded that the right to be elected as a human right has often been used interchangeably with similar but inaccurate concepts, or confused with other rights, resulting in its frequent insufficient conceptualization. Moreover, it is often not considered a positive and guaranteed right. Upon this research, I felt motivated to base this book on the right to be elected and its protection. This work's objective is twofold. First, it aims to clarify the conceptual vagueness concerning the right to be elected and its justification as an important human right, which needs to be protected nationally and internationally. Second, it examines and emphasizes this right's growing importance in democratic and democratizing countries.

Analysis of the electoral rights is not possible without contextualizing them within the wider and correlated concepts of democracy and political participation. Each of these concepts is important in defining and understanding the others. There is no democracy without political participation and elections, and electoral rights are the most common way for citizens to exercise their political participation.

Democracy and political participation are wide concepts, often with different meanings attached. The conceptual diversity of democracy includes many other classifications—republican, elitist, deliberative, participatory, electoral, consensus or consociational. Weber, Schumpeter, Popper, Downs, and other theorists have all attempted to

describe and analyze democratic processes and politics and define democracy, but the concept's inherent characteristic is exactly its under-determination, which allows development of distinct democratic systems in each country, region, and continent. Perhaps the most concise definition of the concept is evident in Abraham Lincoln's famous Gettysburg Address, in which he described democracy as a "government of the people, by the people, and for the people".

Democracy can change over time, take different forms and pass through different phases in different countries. However, certain elements and principles are accepted as the determinants of democracy such as effective participation, equality in voting, and fundamental rights, to name a few. Democracy guarantees its citizens fundamental rights, ensures a broader range of personal freedoms, helps people protect their own fundamental interests, and provides a maximum opportunity for persons to exercise the freedom to live under laws of their own choosing. Democracies do not fight wars with one another and tend to be more prosperous and developed (Dahl 2015). Furthermore, it is argued that every modern country shall aim to establish "a political system that combines democracy on the one hand with freedom, the rule of law, and good government on the other" (Diamond 2003, 9).

Dissolution of the former Soviet Union significantly increased the number of democratic countries and the varieties between them. Newly independent countries of Eastern and Central Europe initially focused on the institutional aspects of democratic transformation, at the core of which are elections. The Organization for Security and Cooperation in Europe (OSCE) emerged as a leading intergovernmental organization to assist these countries in organizing elections, but

also to supervise the election processes to ensure that they would be implemented according to the democratic standards.

The Copenhagen Document contributed greatly to this by requiring states to hold free elections at reasonable intervals through secret ballot and to ensure universal and equal suffrage for adult citizens. It further guaranteed that elected candidates be duly installed in office and allowed to remain in office until their term expires or is terminated, according to legal and democratic procedures (OSCE 1990).

Similar commitments to democracy were numerous and repeated at different meetings and events through declarations and resolutions of many international and regional governmental organizations. And while there is no condition or obligation demanding a country to be democratic to qualify as a member of the UN, regional organizations conditioned their memberships by introducing and maintaining democratic government – such as the African Union, the Commonwealth, the European Union, the Organization of American States, and the participating States of the Organization for Security and Co-operation in Europe.

Despite the importance of democracy and its qualities – especially its interconnectedness with human rights – there is no agreement if there is a human right to democracy. The right to democracy was considered an emerging human right already in the beginning of the nineties (Franck 1992), containing an internal aspect of the right of peoples to self-determination and the human rights to freedom of political activity and free and fair elections.

Thirty years later, it is still not an established and guaranteed right. Although some argue that such a right shall be part of customary international law, this is not supported by

the main international and regional human rights documents and the interpretation of their relevant provisions. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and regional human rights documents guarantee rights which can be considered a variation of the right to participation – the right to take part in the government, the right to take part in conduct of public affairs, the right to free elections and to vote and be elected, but not explicitly the right to democracy.

The relevant provisions of these human rights documents use concepts like periodic genuine elections, universal and equal suffrage, secret voting or secret ballot, equivalent free voting procedures, and free expression of the will of electors to explain the guaranteed rights in more detail. All these concepts are embedded in the concept of democracy. Though some of these concepts might intentionally be left vague, others can be interpreted widely. Critics argue that, as conceptualized as they are, these provisions allow for one-party elections and therefore do not guarantee a right to live under democratic government. There is another argument which claims that democracy can be considered a human right because it gives individuals important functions, such as challenging non-democratic regimes and policies before international courts and review bodies, especially concerning restrictions on the political rights of specific individuals, irregularities in democratic processes, structurally undemocratic features of political systems and the absence of democracy altogether (Fahner 2017, 322).

Although these discussions continue, democracy continues to be a widely accepted important goal, ideal and value for states all over the world. The United Nations, European Union and the Council of Europe adopted democracy and

democratization as their core values and fundamental principles, which guide these institutions through various projects, programs and initiatives that aim to promote human rights, development, peace, and security, ultimately supporting democracy directly. Strengthening the rule of law, enhancing judiciary and public institutions, fighting corruption, monitoring elections, and empowering the civil sector all contribute further to the development of democracy.

The provisions of international and regional human rights documents guarantee effective participation in government as one of the key features of modern democracies. While the quality of these democracies is measured by the extent and scope of political participation in one country, what is effective participation and how is it evaluated?

Citizens' participation in government can be formal and informal and concerns any citizens activity affecting politics. Although often equated with voting turnout at elections, due to the rise of representative democracies and the struggle for universal suffrage at the beginning of the twentieth century, political participation includes other activities as well: voting, contacting public officials, campaigning, lobbying, being a member in political organizations, running for and holding office, protesting, and volunteering are only some of the most common activities accepted and used to evaluate political participation. Additionally, the last two decades' increased internet usage has made online political activities another form of effective participation. Therefore, while electoral rights may not be the only means of political participation, they may be the most effective and important way of achieving political participation in democracies.

Elections can reflect citizens' influence and therefore play an important role in democracies. Voting is not

sufficient, but it is a necessary condition for democracy to exist because without citizens' participation in elections, there is no democracy (Lister and Pia 2015). Through elections individuals have an opportunity to express their political opinion. The importance of electoral rights in every democratic or democratizing country is particularly high. Free, fair, genuine, and periodic elections are one of the pillars of democracy and human rights protections, thus stipulating that there cannot be free elections without full enjoyment of all electoral rights. This interconnectedness is reflected in the provision of Article 3 of Protocol No. 1 to the European Convention of Human Rights, which guarantees free and fair elections. But through the ECtHR's interpretation and its case law, it was accepted that this provision guarantees both the right to vote and the right to be elected.

Electoral rights are political rights, exclusively given to citizens. They include the right to cast a vote (active voting right, universal or active suffrage, (political) franchise) and the right to stand as a candidate (candidacy right or passive voting right). These rights can be enjoyed equally by everyone, without unreasonable or discriminatory restrictions or requirements.

Most of the time, elections are associated with universal or active suffrage, while the related concept of passive suffrage is less known and seldom considered a precondition for determining a level of democratization in a country. On the one hand, this could be a historical legacy, as during the suffrage movement the emphasis was put on voting rights. On the other hand, limiting and restricting candidacy rights is widely accepted as justified. This is still the case as certain groups, such as women and minorities especially, continue

to face permitted restrictions in their full enjoyment of the right to be elected.

The striking asymmetry between active and passive suffrage is evident in the conceptual development, legal regulation, and protection of electoral rights. But is there indeed a justification for this, or should electoral rights be co-equal? Clearly, from a human rights aspect, both the right to vote and the right to be elected should be accepted as equally important political rights. The existing literature gap concerning the nature of electoral rights as a human right confirms this hypothesis. It is difficult to find literature concerning the right to be elected, while the right to vote is quite researched and analyzed. All this clearly indicates that the right to be elected is a neglected right, and this needs to be corrected. The right to vote and the right to be elected are co-equal rights, and one without another cannot be fully enjoyed. To fully enjoy the right to vote, a voter must have an opportunity to choose between a wide range of candidates from the ballot list or even to be on the ballot list, if he or she wishes so. Only in these cases is the right to vote fully enjoyed.

The main purpose of this book is to examine the concept of the right to be elected, the guarantees of this right in constitutions, international and regional human rights documents, and the protection of this right under the human rights regimes. The book addresses the existing gaps concerning the right to be elected—conceptual, theoretical, and legal. It aims to contribute to the understanding and importance of the right to be elected as an important human right, establishing a research agenda for future research on this topic. I claim that there is a need to conceptually develop and theorize the right to be elected as a human right to improve its protection in practice.



The theoretical framework of this book is based on institutionalism and regime theory with a special focus on human rights in both international law and international relations. Institutionalism and regime theory are the most suitable international relations theories to explain the human rights regimes and compliance with their rules, as well as the international human rights tribunals and compliance with tribunals' decisions. As a reconciliation theory between liberal and realist traditions in international relations, regime theory explains systems (including human rights regimes) as the reflection of states' interests in which participation is voluntary and a reflection of citizens' interests and preferences.

The right to be elected is established as a human right and guaranteed in many international and regional human rights documents – International Covenant on Civil and Political Rights, European Convention on Human Rights, American Convention on Human Rights (ACHR) and African Charter on Human and Peoples' Rights (AfCHPR). Its protection on an international and regional level, and consequently on the national level as well, depends on states' access and compliance with human rights regimes rules and human rights tribunals decisions. That is why regime theory's importance in analysis and argumentation for better protection of this right is remarkably high.

This book and its analysis employ qualitative methods – document analysis method and case study. Interpretation and systematization of valid law sources, the examination of relevant legal documents (e.g., international agreements, conventions, protocols, constitutions, laws, court decisions), and different acts of political bodies are examples of the document analysis method applied in this book. As a case study, I examine Bosnia and Herzegovina's current constitutional

system, specifically its emergence as part of the peace agreement and the function of its controversial provisions, efforts for constitutional changes and the guarantee and the protection of the right to be elected, with the focus on the ECtHR's decision concerning the right to be elected and the process of its implementation.

The first part of the book focuses on the conceptual development of the right to be elected, an essential right for any democratic system, and the guarantees of this important human right. Both active and passive suffrage are important political rights, however, the right to be elected is a lesser known and analysed right. The right to be elected is interconnected with the right to vote, and these rights are mutually dependent on each other. At the same time, both rights are constitutive parts of the universal suffrage and political participation; therefore, the right to be elected is a crucial concept in democratic countries whose enjoyment can only be restricted in exceptional circumstances. Synonyms interchangeably used for this human right significantly impact its conceptual development and clarity in the usage of the concept. Following review of the most essential human rights documents' guarantees and comparative analysis of the constitutional provisions prescribing this right, justifies the importance of the right to be elected at national, regional, and international levels. The concept, scope, guarantee and limitations of the right to be elected in these legal texts are explained and discussed. Finally, the restrictions in ensuring the right to vote and the right to be elected are analyzed and explained in this part of the book.

The second part of the book focuses on the protection of the right to be elected under the European human rights regime and analyzes Bosnia and Herzegovina as a case study

in this context. Being the oldest and most successful regional human rights administration, the European human rights regime guarantees protection of the right to be elected for decades. However, while the Court's case law in this area, which is guaranteed under the right to democracy, is underdeveloped, most of its key cases have enabled protection of the right to be elected in Europe. This finds proof in a case study of Bosnia and Herzegovina. The specific character of this post-war state, its constitutional power-sharing arrangements, and their practical impacts, as well as human rights protection are explained and discussed in relation with the cases *Sejdić and Finci v. Bosnia and Herzegovina*, *Zornić v. Bosnia and Herzegovina*, *Pilav v. Bosnia and Herzegovina*, *Šlaku v. Bosnia and Herzegovina*, *Baralija v. Bosnia and Herzegovina*, and *Pudarić v. Bosnia and Herzegovina*. Each of these cases is separately analyzed with the Court's reasons and decisions about the protection of the right to be elected in Bosnia and Herzegovina explained in detail.

The final part of the book provides a comparative analysis of the protection of the right to be elected under the other two regional human rights regimes – American and African. After the detailed analysis of the protection of the right to be elected and case law concerning this right in Europe, this book investigates the guarantee and practical protection of the right to be elected in America and Africa. This book further assesses if and how the right to be elected is guaranteed and protected under the other two regional human rights regimes. Only upon including this assessment in the analysis, it is possible to have a clear idea about the right to be elected.

The primary aim of this book is to raise awareness of an important but neglected human right: the right to be elected. Through investigation of this privilege, this work identifies

the existing conceptual and theoretical gap in research in addition to its guarantees and protection under the regional human rights regimes. This book's modest contribution hopes to present a clearer idea of the concept and to raise awareness of the importance of guarantees and better protection of the right to be elected at international, regional, and national levels.